Filed 12/22/15 Antiques Off Fair Oaks v. Galapagos Holdings CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| ANTIQUES OFF FAIR OAKS, LLC,<br>Plaintiff and Appellant,<br>v.<br>GALAPAGOS HOLDINGS, LLC et al.,<br>Defendants and Respondents. | B254774 & B259979<br>(Los Angeles County Super. Ct. No. BC464558) |
| GALAPAGOS HOLDINGS, LLC,<br>Cross-Complainant and Respondent,<br>v.<br>ANTIQUES OFF FAIR OAKS, LLC et al.,<br>Cross-Defendants and Appellants. | |

APPEALS from a judgment and post judgment order of the Superior Court of Los Angeles County, Ernest M. Hiroshige, Judge. Reversed.

Leopold, Petrich & Smith, P.C., Louis P. Petrich, Vincent Cox and Elizabeth L. Schilken for Plaintiff, Cross-Defendant and Appellant Antiques Off Fair Oaks, LLC and Cross-Defendant and Appellant Francesca de la Flor.

Demler, Armstrong & Rowland, James P. Lemieux and David A. Ring for Defendants and Respondents Steven Schultz and Galapagos Holdings, LLC.

Carlson & Nicholas, LLP and Richard A. McDonald for Defendant, Cross-Complainant and Respondent Galapagos Holdings, LLC.

In July 2010, appellant Antiques Off Fair Oaks, LLC (Antiques) leased a commercial building from respondent Galapagos Holdings, LLC (Galapagos). In this action, Antiques sued Galapagos and owner Steven Schultz (Schultz) (sometimes collectively referred to as Galapagos) for breach of contract, fraud, rescission, and gross negligence alleging, inter alia, that the leased premises lacked required permits and violated the local building and fire codes. Galapagos filed a cross-complaint against Antiques and Francesca de la Flor (de la Flor), under her guaranty of the lease agreement, seeking overdue rent. The trial court entered judgment in favor of Galapagos on both the complaint and cross-complaint.

On appeal, Antiques contends that (1) the trial court construed the exculpatory provision in the lease too broadly when it sustained the demurrer to its breach of contract cause of action, (2) summary adjudication was improperly granted as to the fraud and rescission causes of action pursuant to the economic loss rule, (3) Antiques was denied a fair trial on its gross negligence cause of action and on Galapagos's cross-complaint, and (4) the award of attorney fees to Galapagos was erroneous. We agree and reverse.

## ***FACTUAL AND PROCEDURAL BACKGROUND***

1. *The Lease*

In June 2010, de la Flor, Antiques's owner, walked through the subject premises with Schultz and Galapagos's broker, John Archibald. The premises were under construction; however, Schultz guaranteed that the renovations would be completed with proper permits and up to code. Schultz also represented to de la Flor that the electrical, plumbing, fire sprinkler, lighting, heating, ventilating and air conditioning (HVAC) systems would be in good operating condition by October 2010.

On July 13, 2010, Galapagos and Antiques entered into a standard form commercial lease for the subject building. De la Flor signed a guaranty of the lease.

At de la Flor's request, a paragraph was added to the lease providing that Galapagos would complete the building renovations prior to the commencement of the lease term in October 2010.

Paragraph 8 of the lease required Antiques to obtain commercial general liability insurance and exempted Galapagos from liability for certain types of damage. Pursuant to Paragraph 8.8, "[n]otwithstanding the negligence or breach of this Lease by Lessor or its agents, neither Lessor nor its agents shall be liable under any circumstances for [] injury or damage to the person or . . . property of Lessee . . . from any . . . cause . . . or [for] injury to Lessee's business or for any loss of income or profit therefrom. Instead, it is intended that Lessee's sole recourse in the event of such damages or injury be to file a claim on the insurance policy(ies) that Lessee is required to maintain . . . . "

Antiques took possession of the premises in October 2010, and an architect determined that Galapagos had completed all the renovations agreed to under the lease. However, on December 29, 2010, the City of Pasadena (City) closed the building due to "imminent fire and safety hazard[s] posed by [] un-permitted construction and [] electrical work" including the following conditions: "1. Failure to obtain permits for improvements in the building and illegally occupying the building without a certificate of occupancy. 2. Inadequate means of egress by blocking required exits within the building. 3. Inadequate light and ventilation by removing mechanical ventilation and lighting system. 4. Complete lack of fire sprinklers and fire alarm system . . . . 5. Illegal electrical connection throughout by disconnecting and reconnecting electrical system in the building without proper permits and inspections. 6. Illegal use of a generator to provide power without obtaining proper permits and inspections . . . . "

In January 2011, Antiques's agent sent a letter to Galapagos stating that Antiques had expended $4,500 to "effect the improvements immediately required by the City" and asking Galapagos for reimbursement of these funds. Antiques further stated that the premises lacked heat, the roof was leaking, and the City required "substantial repairs to the electrical system," and asked Galapagos to complete all needed repairs. The letter stated, "[A]ll monies [expended by Antiques on repairs] will be deemed an advance against future rents," and "Antiques must be compensated for" the loss of "substantial revenues" caused by the City's closure.

The City reopened the building in mid to late January 2011. Antiques did not pay the rent due that month.

2. *The Unlawful Detainer Action*

On January 21, 2011, Antiques was served with a three-day notice to pay rent or quit. Galapagos initiated an unlawful detainer action (UD action) the following month.

Antiques filed an answer alleging that it did not owe rent due to Galapagos's breaches of the lease, including Galapagos's failures to obtain permits for the renovations and to provide functioning electrical, fire sprinkler, and HVAC systems. Antiques also cross-complained in the UD action on similar grounds, alleging breach of the lease and fraud. Antiques pled that, prior to the signing of the lease, Galapagos had misrepresented that the building's HVAC and electrical systems were in working order.

In response, Galapagos argued that the premises were delivered in working order, it had promptly completed any required repairs, and it had worked to cure the problems identified by the City within the time period provided for in the lease.

The court concluded in the UD action that Antiques may not "remain in possession of the premises without paying rent, await the lessor's filing of an unlawful detainer action and then set up the claim of damages for the lessor's breach of [the implied warranty of habitability] as a defense to the unlawful detainer." When a commercial landlord breaches the lease, the tenant's remedy lies in bringing a separate action "for breach of a lease provision such as a covenant to repair or maintain the premises . . . . "

Nevertheless, the UD court addressed whether there was any basis for rent abatement or offset under the terms of the lease such that the amount of rent due as set forth in the three-day notice to quit was incorrect, which would defeat the notice requirement which is jurisdictional to an eviction action. The UD court concluded there had been no breach of the lease by Galapagos and no basis for rent abatement or offset. On May 16, 2011, judgment was entered for Galapagos in the UD action in the amount of $25,435 in unpaid rent and costs in addition to repossession of the premises and attorney fees.

3. *The Instant Action; Pleadings*

On June 29, 2011, Antiques filed the instant action against Galapagos and Schultz, alleging that Galapagos had breached the lease by "failing to provide" functioning electrical, lighting and HVAC systems, completing unpermitted renovations that did not comply with local building and fire codes, and failing to fix leaks in the roof.

Antiques filed a first amended complaint, adding causes of action for rescission and fraud in which it alleged that Galapagos had fraudulently induced Antiques to enter into the lease via Schultz's misrepresentations that "[e]xisting electrical, plumbing, fire sprinklers, lighting, [and HVAC] systems 'shall be in good operating condition' on . . . the commencement date of the Lease" and "[a]ll improvements to the Building . . . compli[ed] with the 'building codes, applicable laws, regulations and ordinances.' "

Galapagos cross-complained against Antiques and de la Flor for breach of contract and breach of guaranty based on Antiques's and de la Flor's failure to pay additional rent due and other fees and costs provided under the lease. Antiques and de la Flor filed an answer denying all allegations in the cross-complaint and asserting a variety of affirmative defenses.

Antiques subsequently filed a second amended complaint, adding a cause of action for gross negligence based on Galapagos's unpermitted renovations, failure to adequately maintain the building's fire sprinkler system, "theft" of electricity from the City, and removal of certain windows from the building. Antiques also amended its breach of contract cause of action, alleging that Galapagos had breached the lease by "[f]ailing to deliver the [p]remises with proper operating electrical, plumbing, fire sprinkler, lighting[,] [and HVAC] systems; [¶] [c]utting, and failing to repair or replace, [] electrical wires and lighting . . . [d]isconnecting and/or removing [HVAC] units . . . refusing to repair roof leaks; [f]ailing to obtain permits or comply with applicable laws in making repairs and improvements . . . [f]ailing to bring the Premises up to code . . . [a]nd permitting and/or creating the existence of hazardous substances at the Premises." As

a result of these breaches, Antiques was alleged to have "suffered harm in an amount to be proven at trial."

4. *Demurrer Sustained to Antiques's Breach of Contract Cause of Action*

Galapagos and Schultz demurred to Antiques's second amended complaint, contending, inter alia, that the breach of contract cause of action failed because Paragraph 8.8 exempted Galapagos from any liability for alleged breaches of the lease. In opposition, Antiques argued that Paragraph 8.8 did not bar all breach of contract claims; otherwise, the contractual obligations of Galapagos set forth in the lease would be illusory.

The court sustained the demurrer without leave to amend as to the breach of contract cause of action on the ground Paragraph 8.8 "exempts the lessor from liability for breach of the lease and ordinary negligence" citing to *Frittelli, Inc. v. 350 North Canon Drive, LP* (2011) 202 Cal.App.4th 35, 46 (*Frittelli*). The court further concluded that the lease was not illusory because it "contained notice and insurance provisions under which [Antiques] had an adequate remedy."

5. *Grant of Motion for Summary Adjudication as to Antiques's Fraud and Rescission Causes of Action; Denial of Summary Adjudication as to Gross Negligence Claim*

Galapagos and Schultz moved for summary judgment and summary adjudication of Antiques's remaining causes of action, namely, fraud, rescission and gross negligence.

In the fraud and rescission causes of action, Antiques alleged that it had been fraudulently induced to enter into the lease based on Schultz's representations to de la Flor that the renovations to the leased premises "would be done with proper permits up to code standards" and that "existing electrical, plumbing, fire sprinkler, lighting [and HVAC] systems . . . shall be good operating condition," and Schultz knew those representations were false.

Galapagos argued that these alleged misrepresentations were incorporated into the lease which provided that the HVAC systems would be in good operating condition and the renovations would "comply with the building codes [and] applicable laws."

Accordingly, Galapagos argued that these claims were barred under "the economic loss rule" which "precludes recovery in tort for breach of duties that merely restate contractual obligations." In opposition, Antiques argued that the moving parties "cannot shield themselves from fraud or gross negligence liability by reiterating misrepresentations in a contract."

The court granted summary adjudication on the fraud and rescission causes of action and concluded that these claims were barred by the "economic loss rule" because the alleged misrepresentations were incorporated into the contract. The court denied the motion as to Antiques's cause of action for gross negligence on the ground that Galapagos had not presented evidence disputing the allegation that it had breached its duty of care by "failing to obtain required permits for work on the premises; ignoring a 'stop work' order issued on the premises; removing fire sprinklers and alarms . . . ; stealing electricity . . . ; and failing to install windows . . . . "

6. *Dismissal of Antiques's Gross Negligence Cause of Action*

Trial was scheduled for June 19, 2013 on Antiques's remaining cause of action for gross negligence. In its trial brief, Galapagos argued that the economic loss rule barred any recovery in tort because Antiques had not alleged a breach of any duty independent of the lease.

On June 19, 2013, the court ordered the parties to submit further briefing and continued trial to June 25, 2013. Antiques was ordered to file "a response brief to [Galapagos's] brief [] on the 'economic loss rule' and the remaining duties to be litigated as part of the gross negligence claim."

The parties engaged in limited argument at the June 19 hearing. Galapagos's counsel contended that "on the gross negligence [claim] there's nothing left to litigate because they have to find an issue that is outside the lease terms, or . . . completely independent duty outside of the contract . . . . [The lease] explicitly states that the duty to inspect for appropriateness [of the building] for the tenant's use is on the tenant. . . . [and] the landlord's not here to warrant it[']s fit for your use . . . . If that's

what they're trying to litigate, it's barred." The court responded that "I don't know what we are accomplishing, why you are arguing that point right now."

On June 20, 2013, Antiques filed a response brief arguing that the economic loss rule did not apply to the gross negligence cause of action. On June 25, 2013, the court continued trial due to Galapagos's counsel's illness. The court's minute order also provided: "The Court issues it[]s written tentative ruling re: request for judicial notice and other relief which is signed and filed this date."

In the tentative ruling, the court stated that the economic loss rule barred Antiques "from submitting evidence and argument as to the general duties" "to make repairs and improvements on the Premises" and "to maintain the Premises in a safe condition." Under the heading, "[Galapagos's] Trial Brief Re: Economic Loss Rule and Duties Alleged in Gross Negligence Cause of Action," the court stated "[i]t is difficult to imagine a factual scenario in which [Galapagos] would have breached these duties in a manner independent of the lease. Thus, the Court would have expected [Antiques] in opposition to identify evidence that would suggest [Galapagos] breached these duties in some manner that would not be directly covered by the lease terms. [Antiques] failed to submit such evidence."

The court further noted that "[as] for other alleged breaches of the duties alleged [– duty not to create dangerous conditions, duty to abide by the law, and duty to warn of hazardous conditions –] [Antiques] must make an offer of proof to show how the misconduct was independent from the lease terms." The tentative ruling further noted that it "would be argued at the new trial date."

Antiques thereafter filed a declaration by its counsel setting forth an "offer of proof." The declaration stated that "[Antiques] intends to prove that the[] [following] acts of misconduct are independent of the Lease": Galapagos "[f]ailed to obtain permits," "[i]gnored a 'stop work order posted at the Premises,' " "[v]iolated building, safety and fire codes by failing to install and/or removing required fire sprinklers and alarms," "[s]tole electricity from the city," and "[p]erformed illegal demolition and

construction work." Attached to the declaration were documents describing the City's inspections of the premises.

The court eventually set trial for July 30, 2013. On July 30, 2013, the court began the hearing by stating that it thought Galapagos "counter[ed] each and every aspect of the offer of proof by [Antiques] as to how [it] was going to prove gross negligence." The court asked if Antiques would like to address the court's "tentative ruling" or "further argue [its] points of why [it] should be able to proceed as to gross negligence." Antiques's counsel argued that the evidence provided in its offer of proof showed an independent duty. The court then concluded that Antiques had "fail[ed] to prove the gross negligence cause of action . . . . "

Judgment on the complaint was thereafter entered as follows: "The court agreed with [Galapagos's] arguments . . . that there are no issues to be tried under the sole remaining cause of action for gross negligence in the complaint due to the Economic Loss Rule, namely that [] Antiques [] failed to identify, through its offer of proof, any issues of duty completely independent of the lease provisions. Accordingly, the court ordered that no trial is necessary and that judgment on the complaint be granted in favor of [Galapagos and Schultz] and against [Antiques]."

7. *Judgment on the Cross-Complaint in Favor of Galapagos*

At the July 30, 2013 hearing, Galapagos's counsel suggested that the court try the cross-complaint "by way of declaration" because "all of [Antiques's] affirmative defenses were wiped out in the UD judgment." The trial court asked Antiques's counsel if he "would [] have any objection to proceeding by way of declarations on the further proof on the cross-complaint?" Antiques's counsel stated that "if your Honor wants to hold today I'm precluded from asserting any affirmative defenses, then, with that ruling, [] I would have no objection."

The court stated "maybe we can proceed by way of counteroffer of proof . . . [Galapagos] could submit an offer of proof . . . [a]nd then [Antiques] would be able to submit a[n] offer of proof . . . of the defense on the cross-complaint that [] you maintain that you still have certain affirmative defenses to that offer of proof. And you

would list them and . . . how you're going to prove them and what your legal authority would be for maintaining those and then there would be a reply. . . . I don't know what the offers of proof are going to look like, so if I think there's a need for trial or a hearing, oral argument, then I w[ill] notice you. . . . Otherwise, it might be under submission, okay."

Galapagos filed an offer of proof in support of its cross-complaint and argued that, under the principle of collateral estoppel, the UD judgment barred Antiques and de la Flor's affirmative defenses to the cross-complaint. Antiques filed an "opposition" in which it argued that collateral estoppel did not apply to its affirmative defenses because those defenses were not actually litigated or determined in the UD action.

On September 30, 2013, the court issued an order ruling that Galapagos "is entitled to damages against [Antiques and de la Flor]." The court cited Galapagos's offer of proof and reply brief as the "legal and factual basis and justification for [its] ruling." Galapagos was awarded $239,765 in damages against de la Flor and $184,945 in damages against Antiques ($239,765 minus the $54,820 awarded in the UD judgment).

Thereafter, the court awarded Galapagos $266,824.50 in attorney fees as the prevailing party pursuant to the attorney fee provision of the lease. Antiques and de la Flor timely appealed.[1]

## *CONTENTIONS*

Appellants contend that the trial court erred as follows: (1) the demurrer was improperly sustained as to the breach of contract cause of action because Paragraph 8.8 only exempted Galapagos from breach of contract for certain categories of damages, not for all liability for alleged breaches of the lease; (2) summary adjudication was improper as to the fraud and rescission causes of action because the economic loss rule does not apply when a contract is fraudulently induced; (3) Antiques was denied a fair trial on the

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[1] Appellants filed two separate appeals—one from the judgment (B254774) and the other from the subsequent attorney fee award (B259979). Those appeals have been consolidated for purposes of oral argument and decision.

gross negligence cause of action and on Galapagos's cross-complaint through the trial court's use of "offers of proof" as a substitute for trial, and (4) the award of attorney fees to Galapagos was erroneous.[2]

## *DISCUSSION*

### 1. *The Trial Court Erred in Sustaining the Demurrer Without Leave to Amend as to the Breach of Contract Cause of Action*

We review de novo the trial court's sustaining of a demurrer without leave to amend. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

As discussed above, Paragraph 8.8 of the lease provided that "[n]otwithstanding the negligence or breach of this Lease by Lessor or its agents, neither Lessor nor its agents shall be liable under any circumstances for [] injury or damages to the person or . . . property of Lessee . . . from any . . . cause . . . or [for] injury to Lessee's business or for any loss of income or profit therefrom. Instead, it is intended that Lessee's sole recourse in the event of such damages or injury be to file a claim on the insurance policy(ies) that Lessee is required to maintain . . . . " Antiques contends the trial court erred in sustaining the demurrer as to the breach of contract cause of action because the court's interpretation of Paragraph 8.8—that it denied Antiques any remedy against Galapagos for breach of the lease or negligence—was overly broad. We agree that the trial court erred, at the demurrer stage, in concluding that Paragraph 8.8 barred Antiques from recovering for any alleged breaches of the lease.

The court erred in concluding that Antiques lacked *any* remedy under Paragraph 8.8 against Galapagos for economic loss. First, Paragraph 8.8 expressly limited the types of injury and damage from which the lessor was exempt: (1) injury or damage to the lessee's person or property, and (2) injury to the lessee's business or for

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[2] De la Flor joins in Antiques's arguments on appeal. However, she was not a party to the complaint, which was brought solely by Antiques. Therefore, she does not have standing to appeal the court's judgment dismissing the complaint. She does, however, have standing in her capacity as a cross-defendant to appeal from the court's entry of judgment in favor of Galapagos on the cross-complaint.

any loss of income or profit.[3] However, these two categories do not constitute all forms of economic loss. (See, e.g., *Schulman v. Vera* (1980) 108 Cal.App.3d 552, 561 [noting that a commercial tenant can sue the lessor for costs of repairs the tenant made on the property under certain circumstances]; see also *Groh v. Kover's Bull Pen, Inc.* (1963) 221 Cal.App.2d 611 [holding that a commercial lessor was liable for the recovery of a security deposit after a constructive eviction].)

In reaching its decision to sustain the demurrer, the trial court erred in relying on *Frittelli, supra,* 202 Cal.App.4th 35, to conclude that Paragraph 8.8 exempted Galapagos from all liability for the alleged breaches of the lease. In *Frittelli,* the court interpreted a similar exculpatory clause after a commercial lessee sued the lessor for breach of the lease. (*Id.* at pp. 39-40.) In that case, the lessee operated a store within a shopping center and alleged that its business had been "destroyed" by the lessor's extensive remodeling project that had "impeded customers from seeing and visiting [the] shop . . . . " (*Id.* at p. 42.) The parties' lease contained an exculpatory clause which provided that " '*[n]otwithstanding the negligence or breach of th[e] lease by Lessor or its agents*, neither Lessor nor its agents shall be liable under *any circumstances* for: (i) injury or damage to the person . . . or [] property of Lessee . . . or (iii) *injury to Lessee's business or for any loss of income or profit therefrom*.' " (*Id.* at p. 45, italics omitted.) The lessor moved for summary judgment, contending that "[the lessee's] claims failed in view of the general exemption for lessor liability in paragraph 8.8 . . . . " (*Id.* at p. 40.) The trial court granted summary judgment for the lessor, holding that the exculpatory provision exempted the lessor from liability for breach of the lease under the facts alleged. (*Id.* at p. 39-40.) The Court of Appeal affirmed, finding that the exculpatory language in the lease barred the lessee's claims for damages arising out of the shopping center renovation which allegedly destroyed the lessee's business.

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[3] Paragraph 8.8 also exempted the lessor from liability for damage caused by other tenants; however, that provision is not at issue.

Here, Paragraph 8.8 of the lease contained substantially similar language to that construed in *Frittelli*. However, unlike *Frittelli,* Antiques's alleged losses in this case were not necessarily confined to injury to its business. For example, pursuant to Paragraph 13.6(a) and (b) of the lease, Antiques was required to give notice to Galapagos of any lease obligation of Galapagos that needed to be performed (such as repairs), and Galapagos was required to commence repairs within 30 days and diligently complete the necessary repairs. If Galapagos were in breach of such obligation, Antiques could elect to cure the breach at its own expense and offset from the rent the actual and reasonable cost to perform such cure or presumably could sue to recover those amounts. The second amended complaint alleged general damages as a result of Galapagos's numerous breaches of the lease, and Paragraph 8.8 *only* exempted Galapagos from liability for certain enumerated categories of damages – i.e., "*injury or damages to the person or . . . property of Lessee . . . or injury to Lessee's business or for any loss of income or profit . . . .* " (Italics added.)

In construing the complaint on demurrer, "the allegations of the complaint must be read in the light most favorable to the plaintiff and liberally construed with a view to attaining substantial justice among the parties. [Citations.]" (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1557.) Read in a light most favorable to Antiques, the second amended complaint alleged damages that may have fallen outside the scope of Paragraph 8.8 and, therefore, the clause did not necessarily bar Antiques from recovering for certain alleged breaches of the lease. On these grounds, the court improperly sustained the demurrer as to the breach of contract cause of action.

2. *The Court Erred in Granting Summary Adjudication as to the Fraud and Rescission Causes of Action*

"[S]ummary judgment or summary adjudication is to be granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. A defendant 'moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact.' [Citation.] A defendant may meet this burden either by showing that one or more

elements of a cause of action cannot be established or by showing that there is a complete defense. [Citation.] . . . [¶] . . . [¶] We review a summary judgment or summary adjudication ruling de novo to determine whether there is a triable issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. [Citation.]" (*Mills v. U.S. Bank* (2008) 166 Cal.App.4th 871, 894-895.)

Antiques contends that the trial court improperly granted summary adjudication on the fraud and rescission causes of action pursuant to the economic loss rule, which precludes recovery in tort for breaches of duties that merely restate contractual obligations. We agree.

"The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise." (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 988.) Accordingly, the economic loss rules bars a plaintiff's claim for tortious breach of contract unless the tortious conduct is independent of the breach of contract. (*Id.* at p. 991.) For example, "[t]ort damages have been permitted in contract cases . . . where the contract was fraudulently induced." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 551-552 (*Erlich*).)

Here, the fraud and rescission causes of action were predicated on Schultz's alleged misrepresentations, prior to the execution of the lease, that various mechanical systems on the premises were in " 'good operating condition' " and the renovations were in compliance with "building codes [and] applicable laws." The operative complaint alleged that "[Galapagos] made these promises without any intention of performing [and] with the intent to induce [Antiques] to enter into the Lease and make payments thereon." "Had [Antiques] known the true facts, [it] would not have entered into the Lease, nor rendered performance under it."

To establish a claim for fraud, or a claim for rescission based on fraud, a plaintiff must show "(a) a misrepresentation (false representation, concealment, or nondisclosure); (b) scienter or knowledge of its falsity; (c) intent to induce reliance; (d) justifiable reliance; and (e) resulting damage. [Citations.]" (*Hinesley v. Oakshade Town Center*

(2005) 135 Cal.App.4th 289, 294.) "Fraud in the inducement is a subset of the tort of fraud . . . [and] 'occurs when " 'the promisor knows what he is signing but his consent is induced by fraud, mutual assent is present and a contract is formed, which, by reason of the fraud, is voidable.' " ' [Citations.]" (*Id.* at pp. 294-295.) A party "induced by fraud or mistake to enter into a contract . . . may have the contract set aside and seek restitution of those benefits lost to him by the transaction." (*Merced County Mut. Fire Ins. Co. v. State of California* (1991) 233 Cal.App.3d 765, 771.)

In its motion for summary adjudication, Galapagos argued Antiques could not show fraudulent inducement, or rescission based on fraudulent inducement, because the alleged misrepresentations were incorporated into the lease and the economic loss rule bars fraud claims that "merely restate contractual obligations."

The court agreed with Galapagos and ruled that these claims were barred by the economic loss rule because the alleged misrepresentations were incorporated into the contract. The trial court reasoned Galapagos's evidence "establishe[d] that 'the misrepresentations at the center of plaintiffs' claim [are] the contract itself' and that[, therefore,] the economic loss rule applies." In addition, the court concluded that Antiques had failed to " 'demonstrate harm above and beyond a broken contractual promise' " because Antiques's evidence showed that the alleged misrepresentations "became part of the contract."

Although the economic loss rule generally bars a plaintiff's claim for tort damages in a contract case, this rule does not apply "where the contract was fraudulently induced." (*Erlich*, *supra*, 21 Cal.4th at p. 552.) Accordingly, in *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101 (*Glendale*), the court held that tort damages were permitted where the defendant had obtained a loan by promising to use the loan proceeds for improvements to a property and then had diverted the loan proceeds

for other purposes.[4] (*Id.* at p. 135; see also *Las Palmas Associates v. Las Palmas Center Associates, supra,* 235 Cal.App.3d at pp. 1238-1239 [holding that tort damages were allowed where the sellers of a shopping center who had guaranteed tenant leases had misrepresented their intent to honor the guaranties in order to induce the buyers into consummating the sale].) That the alleged misrepresentations are incorporated into the contract does not prevent a plaintiff from recovering in tort if the evidence shows that the defendant intentionally made the misrepresentations to induce the plaintiff into entering into the contract. (*Glendale, supra,* 66 Cal.App.3d at pp. 134-135.)

Galapagos contends that *Crow v. Kenworthy* (1939) 30 Cal.App.2d 313 (*Crow*) and *A.A. Baxter Corp. v. Colt Industries, Inc.* (1970) 10 Cal.App.3d 144 (*Baxter*) stand for the proposition that a claim for fraudulent inducement cannot stand when the alleged misrepresentation is incorporated into the subject contract. However, *Crow* involved a misrepresentation made after the execution of the subject contract, thus, fraudulent inducement was not at issue. (*Crow, supra,* 30 Cal.App.2d at p. 315 ["The fraud, if any, arose not in connection with the execution of the contract, but long after the contract was executed . . . . "].) As for *Baxter,* although that court held that a plaintiff may not sue in tort when an alleged misrepresentation is incorporated into the subject contract, *Baxter* was decided before the Supreme Court's opinion in *Erlich, supra,* 21 Cal.4th 543 where the Court stated that the economic loss rule does not apply to fraudulent inducement claims.

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[4] Counsel were given the opportunity to file supplemental letter briefs on *Glendale* and *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220 at the close of oral argument. Both parties filed briefs and the panel read and considered them.

Accordingly, as Galapagos did not meet its burden as the moving party of showing that Antiques could not establish tort damages or relief based on rescission, the trial court erred in granting summary adjudication of the fraud and rescission causes of action.[5]

3. *Antiques Was Denied a Fair Trial on Its Gross Negligence Cause of Action*

Antiques contends that the trial court's use of "offers of proof" to try the gross negligence cause of action denied Antiques its right to a fair trial. In response, Galapagos argues that the court properly used offers of proof to adjudicate the gross negligence cause of action in response to Galapagos's "oral motion in limine" seeking to exclude all evidence in support of this claim. Galapagos contends that its counsel's statement at the June 19, 2013 hearing – "[i]f that's what they're trying to litigate, it's barred" – was an oral motion in limine which the court agreed to rule upon.

We cannot conclude that this statement constituted a motion in limine. A motion in limine is properly "made to exclude evidence before the evidence is offered at trial, on grounds that would be sufficient to object to or move to strike the evidence. The purpose of a motion in limine is 'to avoid the obviously futile attempt to "unring the bell" in the event a motion to strike is granted in the proceedings before the jury.' [Citations.]" (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 26 (italics omitted).)

Here, the above-referenced statement by Galapagos's counsel did not indicate that Galapagos was moving to exclude evidence. Rather, the statement reiterated the argument made in Galapagos's trial brief that the gross negligence cause of action was barred as a matter of law because the subject duties were not independent of the lease.

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[5] The court also granted summary adjudication of the rescission cause of action on the alternate ground that, to the extent it was based on mistake, there were no triable issues of fact. It is unnecessary to address this aspect of the ruling because the rescission cause of action survives based on its allegations of fraudulent inducement. (See *Merced County Mut. Fire Ins. Co. v. State of California*, *supra*, 233 Cal.App.3d at p. 771 [A party "induced by fraud or mistake to enter into a contract . . . may have the contract set aside and seek restitution of those benefits lost to him by the transaction."].)

Moreover, contrary to Galapagos's claim, the trial court clearly stated it did not "accept[] this invitation to entertain its oral motion in limine." Thus, Antiques lacked notice that a motion in limine had been made or was being considered by the court.

Alternatively, Galapagos contends that we should treat its "oral motion" as a motion for nonsuit and that any irregularity in procedure was nonprejudicial. "[W]hen the trial court utilizes the in limine process to dispose of a case or cause of action for evidentiary reasons, we review the result as we would the grant of a motion for nonsuit after opening statement, keeping in mind that the grant of such a motion is not favored, *that a key consideration is that the nonmoving party has had a full and fair opportunity to state all the facts in its favor*, and that all inferences and conflicts in the evidence must be viewed most favorably to the nonmoving party." (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1595, italics added.)

Here, we cannot review the court's dismissal as we would grant of a motion for nonsuit because Antiques was not given a "full and fair opportunity to state all the facts in its favor." (*Amtower v. Photon Dynamics, Inc.*, *supra*, 158 Cal.App.4th at p. 1595.) The trial court instructed Antiques in a *tentative* ruling to "make an offer of proof to show how the misconduct was independent from the lease terms." That tentative ruling was "issue[d]" by the court on June 25, 2013 but was not incorporated into the minute order such that it could be viewed as a final order of the court. In addition, the tentative ruling provided that it "would be argued at the new trial date." Under these circumstances, we cannot say that Antiques was given fair notice that it was required to present all of its evidence in an "offer of proof" prior to trial or be subject to dismissal.

Given the manner in which the trial court disposed of the gross negligence claim, a harmless error analysis is inapplicable. In general, "[a] judgment may not be reversed on appeal . . . unless 'after an examination of the entire cause, including the evidence,' it appears the error caused a 'miscarriage of justice.' [Citation.]" (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.) "However, where the error results in denial of a fair hearing, the error is reversible per se. Denying a party the right to testify or to offer evidence is reversible per se. [Citations.]" (*Kelly v. New West Federal Savings* (1996)

49 Cal.App.4th 659, 677.) Here, Antiques was not given a fair opportunity to present its evidence establishing gross negligence. Accordingly, we must reverse the dismissal of this cause of action.

4. *Antiques Was Denied a Fair Trial on its Defense Against Galapagos's Cross-Complaint*

Antiques contends that the trial court's use of "offers of proof" to try the cross-complaint denied Antiques a fair trial on its affirmative defenses. Galapagos, in turn, argues that any procedural irregularity was harmless because, under the doctrine of collateral estoppel, the judgment in the UD action precluded Antiques from asserting its affirmative defenses in this action.

Collateral estoppel, or issue preclusion, applies "(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party. [Citations.]" (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 825.) "The bar is asserted against a party who had *a full and fair opportunity* to litigate the issue in the first case but lost. [Citation.]" (*Id.* at p. 826, italics added.)

As a UD proceeding is "summary in character . . . a judgment in unlawful detainer usually has very limited res judicata effect . . . ." (*Vella v. Hudgins* (1977) 20 Cal.3d 251, 255.) However, " 'full and fair' litigation of an affirmative defense–even one not ordinarily cognizable in unlawful detainer, if it is raised without objection, and if a fair opportunity to litigate is provided–will result in a judgment conclusive upon issues material to that defense." (*Id.* at p. 256-257.)

Here, the trial court in this case entered judgment on Galapagos's cross-complaint after ordering the parties to file "offers of proof" on the cross-complaint and corresponding affirmative defenses. The court cited Galapagos's offer of proof and reply brief as the "legal and factual basis and justification for [its] ruling," apparently adopting Galapagos's argument that Antiques's affirmative defenses were barred by the judgment in the UD action.

Galapagos does not suggest any authority under which the trial court acted when it ordered the parties to file "offers of proof" as a substitute for trial on the cross-complaint. Nor can we review this procedure for harmless error. Whether Antiques had a "full and fair" opportunity to litigate its affirmative defenses in the UD action such that collateral estoppel would apply involves questions of fact regarding the nature and scope of the prior unlawful detainer proceedings. (See *Wood v. Herson* (1974) 39 Cal.App.3d 737, 742 [holding that an unlawful detainer judgment had collateral estoppel effect based on the length of the hearing, the scope of discovery, the quality of the evidence, and the general character of the action].) Because the trial court summarily adjudicated Galapagos's cross-complaint based on offers of proof, Antiques was not given a fair opportunity to present its evidence on this issue. Accordingly, we reverse on the ground that Antiques was denied a fair opportunity to present its evidence. (See *Kelly v. New West Federal Savings, supra*, 49 Cal.App.4th at p. 677 ["Denying a party the right to testify or to offer evidence is reversible per se. [Citations.]"].)

5. *The Attorney Fees Award Must Be Reversed*

After entry of judgment, the trial court awarded Galapagos $202,784.50 in attorney fees against Antiques and, as guarantor under the lease, against de la Flor. Antiques and de la Flor separately appealed the postjudgment order awarding attorney fees and we ordered that appeal consolidated with the appeal from the judgment. Our reversal of the judgment necessarily compels the reversal of the fee award. (See *Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1284.) "After reversal of a judgment, 'the matter of trial costs [is] set at large.' [Citation.]" (*Ibid.*)

## *DISPOSITION*

The judgment and post-judgment order are reversed. Appellants shall recover their costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EDMON, P. J.

We concur:

ALDRICH, J.

JONES, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.